

# Locke Lord QuickStudy: Brownfields and the Deep Blue Sea: Offshore Wind Development and the IRA's Energy Communities Provisions

## WRITTEN BY

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What generates clean power, is located in an Energy Community and is entirely surrounded by water? If you answered “an offshore wind farm along the coast of the United States,” you would likely curry much favor with the growing US offshore wind development community.

The Inflation Reduction Act (“IRA”) provides new incentives for developers of offshore wind projects in the form of revamped investment tax credits (“ITCs”) and production tax credits (“PTCs”) for “qualified energy property.” Further, the IRA establishes a ten percent “add-on” to the baseline PTC or ITC, provided that the qualified energy property is located in an “Energy Community.” The IRA defines an Energy Community as:

- (1) A brownfield site (as defined in subparagraphs (A), (B) and (D)(ii)(III) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) (42 U.S.C. 9601(39)),
- (2) A metropolitan statistical area or non-metropolitan statistical area that has (or had, at any time after December 31, 2009) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil or natural gas (as determined by the IRS), and has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the IRS), or
- (3) A census tract (i) in which a coal mine has closed after December 31, 1999; (ii) in which a coal-fired electric generating unit has been retired after December 31, 2009; or (iii) that is directly adjoining to any census tract in which a coal mine has closed after December 31, 1999 or in which a coal-fired electric generating plant has been retired after December 31, 2009.

Wait a minute, you say ... I may not be an expert in offshore wind matters, but I can read and I am certain that nowhere mentioned in the definition of Energy Community above are the words “offshore wind,” “offshore,” “boat” or even “water.” And indeed, you would be correct. As with a number of aspects of the IRA, the US offshore wind industry has argued to the IRS that the vagueness in several of the IRA’s key tax credit provisions necessitates guidance regarding its intended scope and applicability. We previously addressed several other of these “gray areas” in *Bridging the Gaps: Will the IRA Really Be a Game Changer for Offshore Wind*, including the scope of “qualified energy property,” potentially-misplaced incentives in the scope of “qualifying wind energy components,” and ambiguity in the interplay between state and federal incentives as a result of the IRA’s

passage.

The Energy Community adder presents yet another gray area for the US offshore wind industry. While a fundamental characteristic of an offshore wind farm is the water-based situs of its power-generating turbines, a significant portion of the infrastructure, production, transmission, marshaling, and ultimately the economic impact of offshore wind farms is located on land. For many of the projects in various stages of development along the eastern seaboard of the US, this supporting infrastructure is located on property that meets the “Energy Community” definition set out above. Consider that historically in New England, much of the waterfront that is not residential has been the preferred location for significant maritime, industrial, and in many cases fossil-fuel based energy generation infrastructure. Fast forward to today, the same waterfront property is in high demand to support the development of manufacturing facilities, staging and laydown yards, points of offtake, interconnection and transmission, and ports and terminals to support the construction, operation and maintenance of offshore wind projects. Indeed, the real estate required to support the shore-side infrastructure is in short supply, and in many cases is located on land that would qualify as an Energy Community. The challenge, of course, is that the actual power generating portion of the qualifying energy project is located offshore, which is not expressly included in the definition of Energy Community under the IRA. Consequently, a large number of offshore wind industry stakeholders submitted comments to the IRS, proposing clarifications to the scope of the Energy Community definition.

Developers have taken several different approaches to persuading the IRS to consider some portion, or the entirety of, offshore wind development projects under the Energy Communities provision. The commenters generally fall into one of several categories. Some have taken the position that the whole of an offshore wind farm should qualify for the Energy Community credit because these projects exemplify the policy initiatives behind the Energy Community credit, including the revitalization of brownfields and former fossil fuel plants and redevelopment of underutilized waterfront and port facilities, and will result in the creation of significant economic benefits in the form of jobs and community investments in the land-based areas connected to offshore wind projects.

This line of argument leans on two similar established concepts that arise under different sections of the tax code: Enterprise Zones (“EZs”) (IRC §1397C(f)) and Qualified Opportunity Zones (“QOZs”) (IRC §§1400z-1 and 1400z-2). Under the EZ line of authority, if a business entity or proprietorship uses real property inside and outside the property EZ, and the amount of property within the EZ is substantial compared to that outside, and the properties are contiguous, all services performed, business activities, and tangible and intangible property on the real property in questions is considered to be within the EZ for tax purposes. Similarly, under the QOZ line of reasoning, a substantiality test is performed to determine eligibility. The QOZ requirements are met either: (1) if the amount of real property inside the QOZ is greater than the amount of real property outside the QOZ (the “square footage test”) or (2) if the unadjusted cost of the real property inside the QOZ is greater than the unadjusted cost of the real property outside the QOZ (the “unadjusted cost test”). Proponents of this logic argue for the adaptation of the EZ and QOZ concepts to the offshore wind context to permit projects to claim the Energy Community adder where the offshore wind project is constructed in a location contiguous to or containing property straddling into an Energy Community, and that portion of the energy project constructed on land and designated as an Energy Community exceeds the portion of the land-based project located outside of an Energy Community. In sum, they argue, that any qualified offshore wind energy project that is located in whole or in part in a census tract, metropolitan or non-metropolitan statistical area, or brownfield site, and all energy property that is part of

such offshore wind energy project, should be eligible for the Energy Community credit.

A number of developers have made essentially the same argument relying less on the existing tax code, and instead pointing more broadly to policy considerations. In doing so, they have proposed the following relatively simplistic eligibility test: if any part of an energy project is located on land that qualifies as an Energy Community, the entire project should be considered an Energy Community.

Others have taken a more granular approach, attempting to parse the distinctions between land and offshore-based portions of the project. Some in this camp have argued that if any part of an energy project is located in an Energy Community, the ITC or PTC should be increased by the percentage of the relative capitalized construction cost, nameplate generation, or area by acreage that is located in an Energy Community. Still others have focused eligibility arguments on the location of an offshore wind project's interconnection facility, where the project's power will be settled, the location of port facilities used to stage, crew, construct and maintain the offshore wind farm, or some combination of these factors, with varying views as to the extent to which each of these elements should qualify for the credit.

While offshore wind stakeholders clearly have their own unique perspectives on which of the above-proposed solutions might be most advantageous to their respective development objectives, a universal theme that emerges from the collective comments is the need for greater certainty to allow stakeholders to accurately assess the tremendous economic commitments that these offshore infrastructure projects will require. Assuming that the IRA was intended, in some form or fashion, to provide an opportunity for the offshore wind industry to benefit from the Energy Community adder alongside onshore wind and solar projects, the IRS has been offered a range of potential options from which to establish baseline principles by which developers can assess their development objectives and tailor their project locations and timelines to ensure that they maximize their tax benefits under the IRA. After all, offshore wind development stands to provide significant investments, including job creation, infrastructure development, and economic revitalization to precisely the sorts of underutilized industrial properties that are the intended beneficiaries of renewable energy development projects under the Energy Community adder.

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